No. 18,789

United States Court of Appeals

For the Ninth Circuit

GEORGE BRANGIER,
Appellant,

vs.

JOHN B. ROSENTHAL,
Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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STATEMENT OF JURISDICTION

The Appellant's jurisdictional statement is acceptable.

STATEMENT OF THE CASE

The Appellant's presentation of the Statement of the Case is considered misleading and is controverted. It permits several inferences which a more careful or accurate Statement of the Case would prove to be impermissible. Accordingly, Appellee deems it appropriate to present its own Statement of the Case, which is set forth in the following paragraphs.

As found by the Court (R. 40) the parties were in full accord, and reached a definite and certain meeting of the minds, in April of 1958 for the sale and pur-

chase of certain land in Tahiti owned by Appellant, George Brangier. The agreed price was $35,000.00, of which $10,000.00 was to be paid in cash and was in fact paid in cash within a very short time, and the balance of $25,000.00 was to be paid later, through escrow arangements. (Exhibits P-3 and P-6.) Brangier "estimated" that it might take as long as a month to complete the transaction and "suggested" that the $25,000.00 be sent to the bank in about three weeks time (Exhibit P-3) so as to be available to be paid to him when he would present the deed to the property in Rosenthal's name. (Exhibit P-5.) The form of deed was agreed upon and Brangier likewise agreed to give the bank a letter or statement from Marcel Lejeune (sometimes written LeJeune), Brangier's attorney (R. 46, 117, Exhibits P-19, D-25) described by Brangier as a notary public and lawyer in Tahiti, "informing you that the deed does fully and effectively pass title to you and that it has been recorded". (Exhibit P-3.) In negotiations between the parties Brangier assured Appellee, Rosenthal: "There will be no problem in having the title to my property transferred to your name", and "I guarantee delivery of title of my Tahiti property in your name." (Exhibit P-1.)

A series of problems intervened, so that extensive delays occurred in the bringing of the contract to a conclusion, a "closing" of the deal. (R. 179.) The first problem, and one that continued in existence for approximately two years, was the matter of obtaining the consent of the French government for the trans-

fer. The parties made application to the government of Tahiti for such consent on several occasions, and such consent was ultimately obtained (Exhibits D-46, P-27), but prior to the granting of the same Appellant purported to rescind or cancel the contract of sale. The parties explored different procedural ways of effecting the transfer from the seller to the buyer, and one of the reasons for doing so was the desire of the buyer, Appellee, to establish his anticipated title to the Tahiti property as his separate property, and not community property, as he was at the time engaged in divorce litigation with his wife. (Exhibits D-3, D-6, D-7.) Marcel Lejeune, referred to above, advised Rosenthal "I think it would be prudent for Mr. Rosenthal to retard this transaction until his divorce is final" and he proceeded to suggest a type of interim contract. (Exhibit D-7.) A copy of that advice was sent by Marcel Lejeune to Brangier. (Exhibit D-6.) As discussions, conferences, correspondence and negotiations proceeded, the parties eventually agreed, and the Court so found, to effect the transfer from the seller to the buyer on the basis of an arrangement known or described as "lease-mortgage with promise of sale" (R. 120, 132) and the arrangement was still in effect in August or September, 1960 (R. 141) Brangier having been requested in February 1960 (Exhibits D-24 and 25) and again in September 1960 (R. 148) to execute the papers necessary to carry it into effect. Milton Cades, his attorney, was instructed in February 1960 (R. 69) to undertake the preparation of escrow documents, the parties there-

after discussed certain aspects or procedures for consummating the transaction, and by a copy of Rosenthal's letter of October 25, 1960 to Brangier (Exhibit D-38) Mr. Cades was again asked "to prepare an escrow agreement as previously desired by you. Mr. Cades will also receive the $25,000.00 to be paid to you as soon as the escrow arrangements have been completed."

The "lease-mortgage with promise of sale" method was a practice well known in Tahiti, and an acceptable and lawful way (R. 127), in which transfers could be made from sellers to buyers. The parties then engaged in further discussion, correspondence, conferences and negotiations, concerning the steps necessary to carry through to a conclusion this type of transfer.

At no time was there any intimation by either party of an intention to break off negotiations, nor of an intention to do anything whatever except eventually complete and conclude the sale and purchase. The record shows that the seller, Brangier, even attempted to amend the Agreement (Exhibit P-17) so that only one-half of the property would be sold to the buyer, but he acknowledged the right of the buyer to refuse to make such change and he agreed at the end of January 1960 that the original contract for the sale and purchase of the entire property would be carried out. (Exhibit P-19.) While such procedural steps were being cleared up and ironed out, and without prior notice of any kind, or without demand for performance of any kind on the part of the buyer, Appel-

lee (R. 153-155), the seller, Appellant, purported by a letter dated October 4, 1960 and mailed by Brangier in Honolulu to Rosenthal in Tahiti, to cancel the entire transaction. (Exhibit P-25.)

The attempted concellation of contract was immediately challenged and rejected by the buyer, Appellee (Exhibit D-38), who tendered full payment of the balance due and demanded performance by Appellant. Appellant refused to perform and subsequently sold the property to another party although he knew at the time that the Governor of Tahiti had authorized a transfer of the property to Rosenthal. (Exhibit P-27.) This sale was made at a price said by Appellant to be $45,000.00, or $10,000.00 more than the contract price with Appellee. Evidence was introduced, and found by the trial court to be credible and reliable, which established that the fair and reasonable value of the property at the time of the breach of contract by the seller was $75,000.00, by reason of which fact the Appellee was damaged to the extent of $40,000.00, the difference between such fair value of the property and the contract price. Judgment was entered for such sum, together with interest on the $10,000.00 deposit for the period from the date of making such deposit to the date the same was refunded upon stipulation of the parties.

SUMMARY OF ARGUMENT

The District Court was abundantly supported in its findings by substantial evidence or reasonable inferences therefrom. The contract did not set a time for performance, neither party sought to establish such time, there was no delay beyond a reasonable time nor was there any complaint of delay, and Appellant wrongfully repudiated his contract without notice or demand.

As to damages, similarly as to the findings of fact by the Court with respect to the contract and its breach, there is ample, even abundant substantial evidence to support the District Court's decision.

ARGUMENT

It is deemed appropriate at the outset to direct attention to the fundamental proposition on this appeal. In short, the present inquiry of the Appellate Court is not to see whether it agrees precisely with each and every conclusion of fact, inference from documentary or other evidence, or the findings with respect to credibility of the witnesses, all as expressed in the Decision of the District Judge. Instead, the inquiry is directed to a determination as to whether the findings of the trial judge were "clearly erroneous", as to whether there was any substantial evidence to support them, as to whether the District Court made reasonable choices from among conflicting inferences, and whether the evidence as a whole reasonably tends to support the findings. The following excerpts from

opinions in both Federal and State cases are submitted:

"Where cause was heard by district judge without intervention of jury and judge filed an opinion, including findings of fact and conclusions of law, and findings of fact were not clearly erroneous, and on appeal cause was heard on the transcript of record, briefs and arguments of counsel, the judgment would be affirmed." *Hoge v. Deutsch,* 185 Fed. 2d 259 (C.A. 6, 1950).

"The jury having been waived by stipulations and findings of fact and conclusions of law having been made by the court below, we are limited upon review to the question whether there is substantial evidence to sustain the findings and, if so, we must affirm." *Burkhard Inv. Co. v. United States,* 100 Fed. 2d 642 (C.A. 9, 1938).

". . . when there are conflicting inferences and conclusions, it is the function of the trier of facts to select the one which it considers most reasonable. Yin v. Acme Mattress Co., 40 Haw. 660, 672, 674; Awai v. Paschoal, 43 Haw. 94, 97; Fukuoka v. Dodo, 43 Haw. 337, 340; Sentilles v. Inter-Caribbean Corp., 361 U.S. 107; Behles v. Chicago Transit Authority, 346 Ill. App. 220, 104 N.E. 2d 635." *Dzurik v. Tamura,* 44 Haw. 327, 359 P 2d 164 (1960).

"Where there is conflicting evidence, . . ., the question is one for the trier of fact." and "It is generally recognized that the determination of the trier of fact will not be reversed unless clearly erroneous." *Mitchell v. Branch,* 45 Haw. 128, 363 P. 2d 969 (1961).

"When the construction of an oral contract or of an uncertain written agreement is with the

aid of testimony not unreasonable or inconsistent with the evidence, the conclusion of the trial court will not be disturbed." *Williams v. Denver,* 167 Cal. App. 2d 101, 334 P. 2d 161 (1959).

ANSWER TO APPELLANT'S POINT I

APPELLANT GAVE NO NOTICE OF INTENTION TO TERMINATE AND HE MADE NO DEMAND FOR PERFORMANCE BY APPELLEE.

The period of about one month for completing the transaction was merely an estimate by Brangier himself (Exhibit P-3), and was never thought of by either party as even a suggestion of a time limit. This is demonstrated by the fact that negotiations and discussions as to procedure continued through September 1960 as admitted by Appellant. (R. 127, 165.) Even on April 3, 1961, Appellant's Honolulu attorney was apparently expecting "receipt of the balance of the purchase price." (Exhibit P-27.) It is, therefore, of no significance that in June 1958, shortly after the agreement was entered into, Rosenthal suggested delay as one alternative. (Exhibit D-12.) In this connection, it is necessary to remember that Marcel Lejeune, who was Brangier's notary public and lawyer in Tahiti (Exhibit P-3), advised Rosenthal's attorney in San Francisco that it would be prudent for Rosenthal to retard the transaction until Rosenthal's divorce was final. (Exhibit D-7.) Rosenthal's attitude toward the transaction is best summed up in his own words under cross-examination:

> "I don't believe I have indicated I wanted to delay the transaction. In fact, the opposite, I

wanted to aggressively go forward. But that doesn't preclude trying to find out what can be done." (R. 226.)

Appellant recognizes this on page 24 of his brief.

Brangier's supposition that Rosenthal was to deposit the $25,000.00 balance with the bank in about three weeks was based upon Brangier's own estimate that he would be able to deliver to the bank at about that time

> "a document similar to the photostatic copy that I am enclosing except that it will name you as the owner rather than me. At the same time, I will also give the bank a letter or statement from Mr. Lejeune informing you that the deed does fully and effectively pass title to you and it has been recorded. . . ." (Exhibit P-3.)

Appellant seems to recognize (Brief, p. 25) the principle described in 17A C.J.S., *Contracts,* §435 (incorrectly cited by Appellant as 17 Am. Jur.) as follows:

> "If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so; and where time is not of the essence of the contract he must give the other party a reasonable time thereafter to comply, unless the contract itself dispenses with such notice or unless notice becomes unnecessary by reason of the conduct of the parties. However, notice of intention to rescind is necessary only where a party has merely delayed performance, and not where he has abandoned the contract, or treated it as terminated, or where he has refused to perform. . . ."

There is no evidence in the record that Rosenthal ever abandoned the contract, or treated it as terminated, or refused to perform. Appellant now apparently seeks to interpret his letter of October 4, 1960, sent to Rosenthal in Tahiti (Exhibit P-25) purporting to cancel the contract as notice to deposit the $25,000.00 balance with Appellant's attorney. No such interpretation is possible. Appellant's letter of October 4, 1960, was clearly and unequivocally a repudiation by Brangier of the contract despite the many misstatements which it contains. The Court found (R. 35) that an oral contract of sale was made by the parties, as testified by Rosenthal (Exhibit P-30, page 4, R. 192, 194, 196.) This was confirmed by Brangier's letter of April 16, 1958 (Exhibit P-3) and Rosenthal's letter of April 24, 1958. (Exhibit P-6, R. 196.) Appellant's brief (p. 22) in referring to Exhibits P-3 and P-6 recognizes that the contract was complete not later than April 24, 1958, and that Rosenthal's letter of April 25, 1958 (Exhibit D-2), referred to in Appellant's letter of October 4, 1960, was not part of the contract. Appellant's letter of October 4, 1960, does not ask for $25,000.00 or any other sum of money. It seeks to return Rosenthal's deposit of $10,000.00.

Rosenthal's letter of October 25, 1960, sent to Brangier in Honolulu (Exhibit D-38) reminded him of the fact that Brangier had been advised prior to the time when the letter of October 4, 1960 was written that

> "papers had been prepared for your signature in return for which complete payment was to have been made. . . ."

and continued:

> "*By copy of this letter, I am instructing* (emphasis added) Milton Cades to prepare an escrow agreement as previously desired by you. Mr. Cades will also receive the $25,000.00 to be paid to you as soon as the escrow arrangements have been completed."

Note the words "I am instructing", which Appellant seeks to interpret as meaning that "Cades would get escrow instructions."

In *Doering v. Fields,* 187 Md. 484, 50 A. 2d 553 (1947), cited by Appellant on page 26 of his Brief, the purchasers did nothing until the time fixed for consummating the contract had expired. Only when the seller notified the purchasers that if the money was not paid in 10 days, the seller would cancel, did the purchasers do something—they applied for a loan, which was approved 12 days later. But even after the approval of the loan they were not ready—the title had not been searched and the deed and mortgage still had to be prepared. How different from the case at bar! In our case there never was any notice of *intention* to cancel (R. 187), and there never was any notice to pay the money. (R. 283.) On the other hand Rosenthal was led to believe by Brangier that there was no hurry about depositing the $25,000.00. (R. 283.) Moreover, Rosenthal did not fail to do what he could to consummate the transaction.

ANSWER TO APPELLANT'S POINT II

THERE WAS NO IMPOSSIBILITY OF PERFORANCE AND BRANGIER WAS NOT EXCUSED.

On April 2, 1958, Brangier wrote to Rosenthal "There will be *no* problem in having the title to my property transferred to your name" and "I *guarantee* delivery of title to my Tahiti property in your name". (Exhibit P-1, emphasis added.) It is obvious that when Rosenthal wrote to Brangier on April 25, 1958 (Exhibit D-2) and referred to the possible return of his money he was referring to circumstances that might have arisen in the event of Brangier's death, referred to in the preceding sentence of the same letter. Brangier said the same thing when he wrote his letter of April 15, 1958 (Exhibit P-3):

> "The point remains as to the possibility of death of either of us before this transaction is finally consummated. I would suggest that each of our estates be considered bound to perform. In other words, if I should die prior to the necessary papers coming back from Tahiti to Hawaii and payment by you of the balance due, my executors will be obligated to complete the transaction. If, however, because of my death the Tahitian government refuses to permit the sale, then my estate will return the $10,00.00 to you and the entire transaction will be cancelled."

The Governor's consent to the transfer of title from Brangier to Rosenthal was, in fact, obtained on March 8, 1961 (Exhibits D-46 and D-47) before Brangier disposed of the property to someone else. Prior to the time when such consent was obtained, Brangier offered a lease-mortgage arrangement (Exhibit P-19,

Appellant's Brief, p. 31) which Rosenthal had accepted, as admitted by Brangier (R. 132), and as found by the Court (R. 67), and was attempting to put into effect prior to the time when Brangier sent his letter of October 4, 1960. There was, therefore, no impossibility of performance.

Even if we disregard the lease-mortgage method of consummating the transaction, the most that Appellant could claim was temporary impossibility, a fact contemplated by the parties and which Appellant guaranteed he would overcome. In these circumstances, Appellant is not excused from performance.

The law on this subject is clear. As stated in 17A C.J.S., *Contracts,* §461:

> "A temporary impossibility of performance of a character which, if it should become permanent, would discharge a promisor's entire duty operates as a permanent discharge if performance after impossibility ceases imposes a substantially greater burden on the promisor than that intended by the parties; otherwise, the duty of performance is suspended only while the impossibility exists."

Also applicable is the rule set out in 17A C.J.S., *Contracts,* §463(1):

> "*Permission of government officers.* Where a party enters into a contract knowing that permission of government officers will be required during the course of performance, the fact that such permission is not forthcoming when required does not constitute an excuse for non-performance."

In 17A C.J.S., *Contracts,* §467, the rule is stated as follows:

> "*Legal Impossibility.* The general rule is that performance of a contract cannot be compelled where it would involve a violation of law, or of a governmental order or decree . . . The rule does not apply, however, where the impossibility created by law is only temporary . . . or where the law in question is that of a foreign country and not a domestic law. The inability to . . . secure the . . . consent of a third person whose . . . consent is needed for a performance of the undertaking is not considered a legal impossibility avoiding the obligation, unless the terms or nature of the contract indicate that the promisor does not assume this risk . . ."

Village of Minnesota v. Fairbanks, Morse & Co., 226 Minn. 1, 31 N.W. 2d 920 (1948), cited on page 29 of Appellant's Brief, quotes with approval *Restatement of Contracts* §462 dealing with impossibility of performance. That section reads as follows:

> "Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed on him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists."

Such cases as *Johnson v. Atkins,* 53 Cal. App. 2d 430, 127 P. 2d 1027 (1942), and *Williams Grain Co.*

v. Leval and Co., 277 F. 2d 213 (8th Cir. 1960), cited on pages 29 and 30, respectively, of Appellant's Brief are obviously not applicable. In *Johnson v. Atkins,* the language quoted shows that it was based upon

> "the absence of any express or implied warranty that such thing or condition of things shall exist."

In the case at bar there was an express warranty:

> "There will be no problem in having the title to my property transferred to your name . . . I guarantee delivery of title of my Tahiti property in your name." (Exhibit P-1.)

The quotation from *Williams Grain Co. v. Leval and Co.* is apparently intended to imply that the delay in obtaining the Governor's consent could not have been anticipated by Brangier, and therefore contractually excepted to. Obviously, such an implication is not justified. The holding of the case cited is interesting. The defendant claimed that a shortage of freight cars excused nondelivery of soybeans. The court held (p. 215):

> "Thus, had defendant wished to protect itself against this loss and be relieved of its responsibility under the contract through the happening of this foreseeable event, it could have and should have so provided in the agreement. (Citations) The car shortage is, therefore, unavailing. Consequently, it is unnecessary for us to consider any claimed justification for the defendant's failure to ship the beans when freight cars did become available."

Appellant refers on page 31 of his Brief to the fact that he attempted to impose upon his offer to con-

summate the transaction by the lease-mortgage method a condition which he describes as follows: "that the full agreed purchase price was to be *paid in advance* by deposit in escrow with Cades." Obviously, this was a condition which, as the Court held (R. 67), he had no right to impose. However, even if he did have the right to impose such a condition, no time limit was given for such deposit. As pointed out elsewhere in this Brief, Rosenthal had the necessary documents prepared to consummate the transaction by the lease-mortgage arrangement and offered the balance of the purchase price before Appellant's letter of October 4, 1960, and offered it again shortly thereafter.

Appellant is clearly mistaken when he says on page 32 of his Brief that *"at no time before Brangier terminated did Rosenthal ever accept the lease-mortgage.* There was no meeting of the minds." Appellant himself testified as follows (R. 132):

> "Q. Mr. Brangier, you earlier testified that an agreement was made to enter into the lease mortgage arrangement, the lease with promise of sale arrangement, and that this was made in January or February of 1960; am I correct?
>
> A. Yes, I believe that is right."

It was at about this time that Rosenthal wrote to Cades on February 10, 1960, saying (Exhibit D-23):

> "I have seen the Governor and am hoping to get his immediate approval; this will simplify the transfer. I should know any day. If he says no, we can use the other method; I have discuss (sic) this with both Jean Solari and Marcel Lejeune. The escrow methods as outlined by

> Brangiers (sic) seem somewhat cumbersome, nevertheless I can send you a check at any time for the required amount to hold in escrow."

Rosenthal then inquires of Cades, who is Brangier's attorney, about certain safeguards if the lease-promise of sale (sometimes referred to as "lease-mortgage") method is used. One refers to the obligation of Brangier's estate, referred to as early as April 1958 (Exhibit P-3), and the other relates to insuring against a possible sale by Brangier to a third person. As the Court found (R. 68), these suggestions "were reasonable requests to insure that Brangier comply with his agreement to convey fee simple title, as far as he possibly could, which was his obligation anyway." *Koon v. Maui Dry Goods & Grocery Co.,* 29 Haw. 669 (1927) and same case, 30 Haw. 313 (1928).

Appellant seeks on page 32 of his Brief to ridicule some of Rosenthal's efforts, perhaps to confuse the issues. The problems were not all Rosenthal's. (R. 70.) Appellant says "Heaven knows why" Rosenthal "ordered Solari to obtain French approval for the entry of dollars into Tahiti". (Brief, p. 32.) We suggest that a down to earth reason is found in the following statement: "I was advised by Jean Solari that permission had to be obtained from the Office of Exchange in order to complete the lease-mortgage and promise of sale arrangement." (R. 180.) Appellant also apparently wants to forget about Rosenthal's letter of September 8, 1960 to Cades (Exhibit D-33, quoted below) hoping that it will disappear.

Appellant asserts (Brief, p. 33) that "*at no time before* Brangier terminated was Rosenthal willing to accept the lesser title." Here, Appellant does not interpret the letter of October 4, 1960 as notice of intention to terminate. Compare page 25 of Appellant's Brief. The assertion is erroneous. On September 8, 1960, Rosenthal wrote from Tahiti to Cades (Brangier's Honolulu attorney):

> "The papers are being prepared here and if George [Brangier] wishes his check here, I would give it to him or otherwise send it on to you as previously planned." (Exhibit D-33.)

The letter also told Cades that the government had approved the arrangement and requested Cades to "work out a satisfactory U. S. contract with dispatch." Cullinan (Rosenthal's San Francisco attorney) also wrote to Cades on September 16, 1960 (Exhibit D-34), referred to the government approval of the lease-mortgage plan suggested by Lejeune (Brangier's Tahiti notary and attorney), and asked for suggestions from Cades. Cades replied to Cullinan by letter dated September 20, 1960 (Exhibit P-23) from which it is apparent, as the Court found, that

> "through the deliberate failure of Brangier to give his own attorney the details of the supplemental agreement which he insists his attorney draft as a condition precedent to depositing the escrow amount with Cades and proceeding to consummate his contract, further delay is engendered." (R. 75.)

Rosenthal followed through on September 27, 1960 as indicated by his memorandum of September 27, 1960,

to Cades, Cullinan and Solari. Appellant acknowledges that during the month of September 1960, Rosenthal *again* had the papers for the lesser title presented to Brangier who would not sign them. (Brief p. 33.)

Before Brangier finally sold the property to Clouzot he knew of the government's consent to a transfer of the land to Rosenthal, and Cades wrote to Cullinan that Brangier

> "will advise me as to the receipt of the balance of the purchase price. I will advise you as soon as I hear from Mr. Brangier further in the matter." (Exhibit P-27; R. 137; R. 294.)

Appellant relies on *Restatement of Contracts* § 458, comment b, to support his mistaken assertion that he was excused from performance. (Brief, p. 34.) The cited section is not applicable. If there was any impossibility, which we deny, it was only a temporary impossibility. The applicable section is 462, quoted on page 14 of our Brief. Appellant relies on 6 *Williston on Contracts* (rev. ed.) § 1938 for his allegation that "the impossibility was of uncertain duration, and performance was excused." The cited section does not support Appellant's position. It says:

> "Impossibility due to foreign law does not fall within the same class as that due to domestic law, and it has generally been held no excuse for breach of contract."

Moreover, this section and the section from the Restatement deal with "impossibility due to change of

law." Does Appellant now claim that there was a change of law?

Restatement of Contracts, § 276, which deals with rules for determining materiality of delay in performance, reads as follows:

> "(d) In contracts for the sale or purchase of land delay of one party must be greater in order to discharge the duty of the other party than in mercantile contracts.
>
> "(e) In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless, (i) the contract expressly states that performance at within a given time is essential, or (ii) the nature of the contract, in view of the accompanying circumstances, is such that enforcement will work injustice."

ANSWER TO APPELLANT'S POINT III

AMPLE EVIDENCE AND REASONABLE INFERENCES FULLY SUPPORT THE DISTRICT COURT'S FINDINGS CONCERNING ESCROW PROVISIONS.

Here, much complaint or criticism is thrown at the District Court's analysis of the negotiations and discussions of the parties concerning "escrow". The Appellant seems to make much of a suggestion that the District Court uses the words "normal type escrow" as some kind of term of art which must be defined or

interpreted and claims there is no evidence pertaining thereto. Actually, of course, examination of the Decision discloses that this term was only one small part or portion of the fairly extensive analysis and discussion of the Court concerning the ideas and intentions of the parties as to escrow. It is deemed appropriate to set forth here some of the decision language which by itself constitutes an adequate explanation of the Court's analysis (R. 38):

> "Brangier in his letter (Ex. P-3) estimates as much as 31 days, or a month, before the documents can get back to Honolulu for delivery to the bank and suggests Rosenthal send the $25,000 balance after the first $10,000 down payment, to the Bishop Bank in about 3 weeks' time. Here the very information and suggestion noted indicate *not* an intent to have the money placed on deposit in escrow immediately with Bishop Bank as a condition to proceeding further with the prosecution of the transaction, *but rather,* a purpose to carry out a *normal type* of escrow arrangement whereby, in order to insure that at the moment delivery is made and the money paid, *the title will be good,* the delivery should be made through a common escrow agent, *at the time of consummation of the transaction.* This is the intent the court finds from this letter, rather than the implication sought to be read into it and other correspondence (except as hereinafter noted) by the defendant, that, regardless of how long Brangier should take in completing his guarantee to produce clear title, Rosenthal should have the money sitting idly in escrow with the bank within 3 weeks."

and (R. 40):

> "Up to this point, then, we have what appears to be written memoranda signed by the defendant of a binding oral contract to deliver clear title to Rosenthal including government consent, for a total of $35,000 cash, $10,000 down, and the balance payable through a simultaneous transaction through escrow, whereby the $25,000 balance will be exchanged for delivery of the deeds with evidence of clear title, whenever the papers are presented.
>
> "The foregoing letters evidence a rather intimate friendship between the two men, just the opposite of the type of relationship under which Brangier would be expected to demand that his friend put up the $25,000 balance in escrow immediately and maintain it thereafter, regardless of how long Brangier should take to deliver clear title."

and (R. 41):

> "This indicates that Brangier himself knows that Rosenthal is a man of 'considerable means', a friend, and a 'very fine person', and hence there would not be any fear by Brangier that he wouldn't get his money. All of this reinforces the court's interpretation that the escrow transaction was not intended as a condition precedent, but simply as a convenient means of consummating the deal in a normal and usual business manner. The court so interprets the next paragraph of Exhibit P-5 concerning the down payment and the balance to be deposited in escrow."

Again in his decision (R. 43) the District Judge in his analysis points out that the letter in which the

"3 weeks' time" is mentioned, Exhibit P-6 was not in any sense the only language used by the parties. The Court says:

> ". . . Accordingly this letter of April 24, 1958, (Ex. P-6) did not really express, and was not intended (as between the parties) to constitute, the actual agreement, and P-6 must be construed in connection with and controlled by Exhibits P-1, P-2, P-3, P-4 and P-5, and Exhibit D-1."

And in continuing his analysis of the intentions of the parties regarding escrow, the District Judge refers to another of Brangier's letters, Exhibit P-8, and says (R. 43):

> "These are clearly facetious statements on the part of Brangier but show that he was going along with the fictitious documents to lend more credence to any attempt to reduce the fees payable to the Tahitian government. However, it further confirms the court's interpretation of the previous and real arrangement—that the balance was to be paid to Bishop Bank in escrow at or about the time of the expected consummation of the transaction, which then was estimated by Brangier to take only a very few weeks."

And again the District Judge states (R. 45), referring to the language in Exhibit D-2:

> "These provisions are entirely consistent with the court's interpretation of the previous documents heretofore stated—that the escrow was intended as the ordinary escrow arrangement and not as a requirement that $25,000 should be immediately deposited to lie idle, regardless of the

> length of the time it took to complete the transaction."

After further careful analysis of the oral testimony, the District Court says (R. 50):

> "The totality of this testimony corroborates Rosenthal's testimony and the court's finding that the deposit in escrow of the $25,000 was never considered a condition precedent by Brangier until at least January 29, 1960, when Brangier wrote Exhibits P-18 and P-19."

Surely the Court was abundantly entitled to infer that the "3 weeks' time" referred to by Brangier was a suggestion or estimate, and that the "31 days" or "one month" referred to in the Decision (R. 38) was likewise a suggestion or estimate, and it would now be an absurdity to hold that this was some kind of notification of deadline. The absurdity is demonstrated conclusively by the fact that the parties continued their discussions and negotiations for almost exactly two and one-half years more, before Brangier made his effort to repudiate and dishonor his undertaking. Brangier unhesitatingly testified that right up to and including September of 1960 his agent and attorney, Lejeune, acting for him and on his behalf, was continuing with his efforts to obtain the consent of the Governor of Tahiti. (R. 127 and 165.) Finally, Brangier's sole basis of his attempted repudiation, as disclosed by his letter of October 4, 1960, Exhibit P-25, was the then continuing refusal of the Governor to consent, and no mention was made of the non-de-

posit of the balance, and even at that time no demand was made that it be deposited.

In the light of the patently reasonable conclusions and inferences of the District Judge concerning the escrow matter, it is deemed needless to comment on the citations offered by Appellant indicating that there may be some cases dealing with escrows where the parties may have contemplated a deposit of money in advance.

As to the escrow aspects of the lease-mortgage negotiations, there is ample testimony which the Court was entitled to believe, to the effect that Appellee (Rosenthal) was ready and willing to deposit the balance of $25,000, even with Cades, Appellant's attorney, and offered to do so, and intended and desired to do so. (R. 282-283.) The District Judge was likewise abundantly entitled (R. 68 to 69) to the very reasonable inference that Rosenthal's letter of February 10, 1960, Exhibit D-23, both by its own language and when considered in the light of all of the surrounding facts and circumstances and other correspondence, constituted an acceptance of the lease-mortgage suggestion and a request to Attorney Milton Cades to proceed with at least the preliminary drafting of escrow provisions. After careful analysis, the District Judge makes this comment (R. 71):

> "Inasmuch as Exhibit D-23 indicates that Rosenthal intended to be in Honolulu March 1st, and then to go to San Francisco and return to Honolulu shortly thereafter, and Exhibit D-26 indicates that Brangier saw Rosenthal in Honolulu

> before March 7th on his way to San Francisco, it is a fair inference, from this and later correspondence, that Milton Cades, although authorized to proceed with preparation of an escrow agreement satisfactory to Brangier, did not do so, and that this was with the express or implied consent of Brangier. In this connection the court again refers to the testimony of Rosenthal, which the court finds credible, that he many times, at least orally, and at least once by letter, offered to put the money up in escrow, but was told that it was not necessary, at least at that stage. It is also a fair inference that Cades advised Rosenthal and Brangier, and Brangier acquiesced in it, that he could not draw a proper escrow agreement until the final terms of the agreement in Tahiti had been drafted in Tahiti. (See Ex. P-22)."

The matter which Appellant describes as a "lying-idle" concept is not considered by Appellee to call for any answer. It is plainly irrelevant to the present discussion, as it has already been demonstrated that there is abundant evidence, and reasonable inferences from abundant evidence, to support the District Court's findings concerning escrow.

ANSWER TO APPELLANT'S POINT IV

FINDINGS OF THE COURT CONCERNING EXHIBIT D-23 ARE REASONABLE.

This part of Appellant's argument has been referred to and answered in the foregoing, but some brief reiteration may be appropriate. Appellant appears to take a few words or expressions out of the

context of Exhibit D-23 as a whole, and sets forth a claim that the same could have no meaning other than a refusal by Appellee Rosenthal of the offered lease-mortgage arrangement. A reading of the pertinent portions of Exhibit D-23, as set out below, instantly refutes such contention, at least to the extent of showing conclusively that the inference of the District Court was reasonable:

> "Now, to the property; as you know I have seen the Governor and hoping to get his immediate approval; this will simplify the transfer. I should know any day. If he says no, we can use the other method; I have discuss this with both Jean Solari and Marcel Lejeune. The escrow methods as outlined by Brangiers seem somewhat cumbersome, nevertheless, I can send you a check at any time for the required amount to hold in escrow. If possible, I should like to predate the check and ask if you hold it and advise when to cash. This should coincide with the final signatures. My reasons for this are obvious; under any circumstance there will be no problems about this, as far as I am concerned. If I should receive the Governor's O.K., will let you know immediately.
>
> "I will like to also ensure in the event of lease-sell agreement, Brangier alters his will and makes me beneficiary of that property. What do you think?
>
> "Also, in matter of lease-sell, is there some method to insure against resale by Brangier? This is not to doubt Brangier in any way, but merely to make these documents technically perfect. Any suggestions?

"I am extremely pleased that George has decided to honor his agreement with me and in view of this, would you pass on to him the following proposal, . . ."

Surely the District Judge could not possibly be "clearly erroneous" in regarding the foregoing language as an indication of acceptance of the lease-mortgage arrangement by Appellee Rosenthal, but if there were ever any conceivable doubt about the question, the same was resolved completely by Appellant Brangier in his own testimony (R. 119):

"A. Yes. At a later date I suggested a lease with a promise to sell.

Q. You were familiar with such procedures, then?

A. Yes.

Q. You had engaged in such procedures before?

A. Yes.

Q. Is it not correct to say that such procedure was fairly common in Tahiti for the sale of property?

A. It is.

Q. And you wrote to Mr. Rosenthal about it?

A. Yes, I believe I did.

Q. And you reached agreement with Mr. Rosenthal that you would follow up on that method?

A. Yes."

and (R. 124):

"Q. When you went there in May or June of 1960, this lease mortgage arrangement was pending, was it not?

A. It was pending, yes."

and (R. 132):

"Q. Mr. Brangier, you earlier testified that an agreement was made to enter into the lease mortgage arrangement, the lease with promise of sale arrangement, and that this was made in January or February of 1960; am I correct?

A. Yes, I believe that is right."

ANSWER TO APPELLANT'S POINT V

THE DISTRICT COURT'S ALLEGED CONFUSION BETWEEN THE "ESCROW INSTRUCTIONS" AND THE "U. S. SUPPLEMENTAL AGREEMENT" IS OF NO SIGNIFICANCE.

The Appellant seeks to find that the Court misunderstood the negotiations of the parties concerning a supplemental agreement in the United States, and somehow committed error by regarding this as the same thing as the proposed or requested escrow instructions. To begin with, it wouldn't matter at all if the District Judge had not clearly understood the comments about the references to the U. S. Supplemental Agreement, as we have already demonstrated that the parties did agree to the lease-mortgage arrangement and were actively discussing either in person or through authorized representatives, the way or manner of consummating such agreement, when the attempted repudiation was made. In speaking of the draftsmanship duty assigned to Attorney Milton Cades, the Court says (R. 71):

". . . It is also a fair inference that Cades advised Rosenthal and Brangier, and Brangier acquiesced in it, that he could not draw a proper

escrow agreement until the final terms of the agreement in Tahiti had been drafted in Tahiti. (See Ex. P-22)."

And the Court very reasonably finds a relationship between the escrow instruction matter and the U. S. Supplemental Agreement matter in the language of Appellant's own attorney, Mr. Cades, in the following part of the Decision (R. 72):

> "Mr. Cades replied to this letter (Ex. D-29) by a letter of May 18th (Ex. P-22) in which he reminds Rosenthal that:
>
> " '. . . I advised you that the transfer documents or other agreement would have to be prepared under the laws of Tahiti, but that there was nothing to prevent you from having a supplemental agreement in the United States. I have discussed the matter further with George and neither one of us are sure that we understand what you mean by a property exchange. In any event, until you have agreed on the form that the transaction is to take in Tahiti, there would be no point in working up any kind of contract here . . . It is my suggestion that you wait until you have an acceptable agreement in Tahiti before you attempt to draw any supplemental agreements here.'
>
> "This is conclusive evidence, along with other evidence, that the drafting by Mr. Cades of the escrow instrument demanded by Brangier was delayed at Brangier's own instance rather than through Rosenthal's actions or inaction."

Note also the further commentary of the District Judge at page 75 of the Record.

Even if the "escrow" intentions of Appellant Brangier were definable as meaning nothing more than a deposit of $25,000 by Rosenthal, there still remains the conclusive and unanswerable fact that Brangier was obliged by the only applicable rule of law to give notice and make demand first, before he could declare a rescission. This matter is discussed elsewhere in this Brief.

ANSWER TO APPELLANT'S POINT VI

DEFENDANT WAS NOT DENIED SUBSTANTIAL JUSTICE WHEN HE ATTEMPTED TO IMPEACH PLAINTIFF.

The allegation of error in this matter is frivolous. No authority is cited in support of Appellant's position. Obviously, there was no error. The matter is adequately discussed in the Trial Court's Decision. (R. 53-54.)

The manner and scope of cross-examination is generally considered as largely within the discretion of the trial court. 5 Am. Jur. 2d, *Appeal and Error,* §884. The exercise of such discretion cannot be made the subject of review on appeal. *Johnston v. Jones,* 1 Black (66 U.S.) 209, 17 Law. Ed. 117 (1862). In *Territory v. Goo Wan Hoy,* 24 Haw. 721 (1919) the court held (p. 727):

> ". . . the extent to which disparaging questions not relevant to the issue may be put on cross-examination is discretionary with the trial court and its rulings are not subject to review here unless it appears that the discretion was abused. *Republic v. Luning,* 11 Haw. 390."

ANSWER TO APPELLANT'S POINT VII

THE AWARD OF DAMAGES WAS PROPER AND NOT EXCESSIVE.

Appellant begins his argument on Point VII with the incorrect statement that (Brief, p. 52):

> "The court's award of $40,000 in damages was founded upon its determination that the property had a fair market value of $75,000 as a hotel site or multiple-unit subdivision."

It is true that the court found that the property had a market value of $75,000 (R. 89) and that the court took into account its possible use as a hotel site or multiple unit subdivision although Rosenthal intended to use it initially for a residence. It was proper to do so.

Appellant relies on the old English case of *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502 (1854), cited in 15 Am. Jur., *Damages,* §52. In that case the plaintiffs had taken a broken shaft of a mill to the defendants, who were carriers, for the purpose of having it carried to another city so that a new shaft could be made. The defendants knew that the plaintiffs were millers of the mill. The delivery of the shaft by the carrier was delayed by some neglect. As a result, the plaintiffs did not receive the new shaft for several days after they should have received it, the working of the mill was thereby delayed, and the plaintiffs thereby lost certain profits that they would otherwise have received. The court held that the information communicated by the plaintiffs to the defendants was not sufficient to show that the profits of the mill would

e stopped by an unreasonable delay in the delivery f the broken shaft to the third person and that the laintiffs were, therefore, not entitled to recover such rofit.

We submit that neither *Hadley v. Baxendale* nor 5 Am. Jur., *Damages,* §52 has anything to do with ur case. In our case we are concerned with damages or the breach of a contract for the sale of land. That ubject is discussed in 55 Am. Jur., *Vendor and Purhaser,* §555, as follows:

> "The general rule is laid down in many cases that the purchaser is entitled, as general damages for the wrongful failure or refusal of the vendor to convey, to recover the difference between the actual value of the land and the agreed price, together with any payments he may have made, or the value of the land deducting the amount of the purchase money unpaid. These statements are substantially the same in effect and result in giving the purchaser as damages the benefit of his bargain in case the land is worth more than the price agreed upon. (Citations.) This is very generally recognized where the vendor cannot be said to have acted in good faith (Citations), as where, after the making of the contract, he disables himself by his own act or neglect from being able to convey (citations), or where, having the ability to do so, he refuses to convey because of an advance in the value of the land or otherwise. (Citations.) . . ."

The actual value referred to in the preceding quotation is, of course, market value, "the highest price obtainable in the open market for cash." 55 Am. Jur., *Vendor and Purchaser,* §556. See Annotation, 48

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ALR 71. In determining such value it is proper to consider the highest and best use of the land. *Dady v. Condit,* 209 Ill. 488, 70 N.E. 1088 (1904).

The same rules of law are discussed in Corpus Juris Secundum in the following manner:

> ". . . in all jurisdictions where the vendor refuses to convey when he has title (citations) or wilfully puts it out of his power to convey (citations), the purchaser may recover for loss of his bargain." 92 C.J.S., *Vendor and Purchaser,* §592 a.
>
> "Taking the value of the property at the time of the breach or for performance as a basis, the measure of damages ordinarily is the difference between such value and the contract price (citations), with, according to some cases, interest on such difference (citations), to the date of judgment. (Citations.) . . . and it has been held or recognized that in addition to the above items of recovery the purchaser is entitled to the return of the purchase money, if any, which has been paid (citations), with interest (citations), from the time of payment (citations); . . ." 92 C.J.S., *Vendor and Purchaser,* §595.
>
> "In accordance with general rules of damages, the market value (citations), or, as sometimes stated, the fair market value (citations), of the land sold is taken as the basic figure in determining the amount of damages; . . . While, in determining the value, there is no limitation to a particular use to which the land may be put (citation), if, by reason of the adaptability of land to a particular purpose, it commands a higher price in the open market than it otherwise would, such greater value is to be considered.

(Citation.)" 92 C.J.S., *Vendor and Purchaser,* §599.

There is substantial evidence in the record supporting the finding of the Court that the reasonable value of the land was at least $75,000.00 (R. 88-90, 293, 300-301; 305-307; 314-315; 367.) The only appraiser who testified was Andre Leontieff, a resident of Tahiti for over 28 years, the only real estate agent there for 20 years (R. 284), who under a government appointment in Tahiti had occasion to appraise real property. He was "called up many times to expertize or estimate property in litigation." (R. 285-286.)

We do not understand Appellant's argument relating to interest. It seems to be predicated on the fact that Rosenthal refused the return of the $10,000.00 in October 1960. Rosenthal had to refuse it at that time. He was still attempting to compel Brangier to live up to the contract. Rosenthal was deprived of the use of the $10,000.00 from the time of its deposit in April 1958 until the withdrawal by stipulation in 1961. As a matter of fact, Rosenthal should also be awarded interest on the $40,000.00 from April 1961 when Brangier conveyed the property to a third person, or from September 1961 when the Complaint was filed in this action, until March 26, 1963, the date of the judgment.

CONCLUSION

Point by point, the contentions put forth by Appellant are fully and effectively refuted in and by the record in the case. The testimony, the exhibits, and

the abundant reasonable and proper inferences from the evidence all point to the existence of a valid contract between the parties which was wrongfully broken by Appellant, to the proven reasonable damage to Appellee in the sum of $40,000.00 plus interest. The painstakingly careful and well-reasoned decision of the District Court not merely passes the test of being other than "clearly erroneous", but is amply supported in all respects by substantial evidence of a kind describable as clear and convincing. The judgment must therefore be affirmed.

Dated, Honolulu, Hawaii,
February 7, 1964.

Respectfully submitted,
THOMAS W. FLYNN,
BERNARD H. LEVINSON,
Attorneys for Appellee.

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

THOMAS W. FLYNN,
BERNARD H. LEVINSON.